this common and continuing intention lies upon the party who claims that the written contract should be rectified: *Tucker* v. *Bennett* [(1987] 38 Ch.D. 1, 9]. If the evidence is such as to satisfy one that common intention did not appear in the written document then there is a case for rectification."

The principles advocated in the cases cited above clearly show that a court should be cautious in allowing a rectification of any written instrument. It is not the function of the court to re-write an agreement which the parties had entered into nor should it allow a party who subsequently found that the terms of the agreement were unfavourable to him, and to avoid performance of the agreement, sought the assistance of the court to rectify it under the guise that the agreement did not reflect the common intention of the parties.

Transposing the aforesaid principles to the instant case, it is clear as to what exactly the parties had agreed and that is that the company agreed to transfer to the defendant to the counterclaim without any money the land comprised in Lot 36 as marked in red on the annexure to the agreement. The shape and the size of the land was stated in the plan which PW1 said was triangular in shape consisting of 4,862 square feet. PW1 was very unequivocal when he said:

"Both the parties were aware that the area of the land was 4,862 square feet as both of us had looked into the plan. I have initialled my name in the land next to Lot 36."

He also confirmed that the company agreed to transfer the land in Lot 36 to the defendant to the counterclaim in consideration of his agreeing to shift his house and his shrine from Lot 28 and Lot 30 to the said Lot 36 to enable the company to develop Lot 28 and Lot 30. In the result, it cannot therefore be said that the final written instrument did not carry out the antecedent agreement. It is also important to note that it was only after the Bandaraya Kota Star had approved the original layout plan in principle that the agreement was entered into by the parties. It is therefore not unfair to say that the company was relying on the approval which it had obtained from Bandaraya Kota Star in respect of the layout plan when it entered into the agreement with the defendant to the counterclaim and the approved layout plan was annexed to the agreement. On the other hand, the defendant to the counterclaim had nothing whatsoever to do with the transactions that were carried out between the company and the Bandaraya Kota Star officials. All he knew was that he was offered the land comprising in Lot 36 with an area of 4,862 square feet and he had accepted the same. There was no mistake whatsoever in the making of the agreement. It fully contained what had been agreed by both parties prior to the signing of the agreement. The company could have inserted an additional clause to safeguard itself by providing that should the area of the land comprised in Lot 36 exceed 4,862 square feet the defendant to the counterclaim had to pay for the additional land at a certain price. It is obvious that in the circumstances, such a provision had never entered the minds of the company's authorized representatives since the layout plan had already been approved by the Bandaraya Kota Star. The substitution of the layout plan was never in the mind of either party. In such a state of affairs, can the company now come running to this court to ask for rectification of the agreement when due to an intervening action by a third party the terms of the agreement had become unfavourable or more onerous. The answer must be in the negative. Rectification is certainly not the proper remedy in cases of this nature. There may be other more appropriate remedies to which the company could resort but to my mind rectification is certainly not available to it.

For the above reasons, the counterclaim is dismissed with costs.

Order accordingly.

Solicitors: *George John & Co.; Syarikat Visva.*

MOBIL OIL MALAYSIA SDN. BHD. v. OFFICIAL ADMINISTRATOR, MALAYSIA

[O.C.J. (Peh Swee Chin J.) November 10 & 16, 1987]

[Ipoh – Civil Suit No. 21-125-86]

Constitutional Law – Ruler of state – Deceased – Estate of – Suit against administrator of – Unconditional appearance – Defence of royal prerogative of immunity – Whether appearance amounted to submission to jurisdiction of court – Federal Constitution, Art. 181 – Perak Constitution, Arts. X, XI & XII – "Sanctity ... to the person of the sovereign" – "Sovereign can do no wrong".

The plaintiff claimed against the estate of the late Sultan of Perak for a sum of money, being the price of diesel oil supplied to a mining company of which the late Sultan was the sole proprietor.

The defendant, who was the administrator of the estate, entered an unconditional appearance to the suit and filed a defence in paragraph 5 of which he claimed "the deceased's estate is not liable for the (alleged debt) as the deceased was at all material times the sovereign of the state of Perak and therefore not liable to any proceedings whatever in any court." On an application by the plaintiff, the court ordered that a preliminary issue as to whether the said paragraph 5 of the defence disclosed a good defence in law be tried first before the trial of other issues in the action.

Held: (1) both from the Federal Constitution and the Laws of the Constitution of Perak, no legal proceedings of whatever nature, criminal or civil, could have been maintained against the late sovereign, and the same position still obtains today in Perak;

(2) the nature of the prerogative of immunity from all legal process was personal to the late sovereign and could not be transmitted to the administrator of his estate. The administrator therefore could not waive the prerogative of immunity for he had nothing to waive. His entry of an unconditional appearance would become completely immaterial and ineffective;

(3) the unconditional appearance coupled with a defence of royal prerogative of immunity did not amount to a submission to the jurisdiction of the court;

(4) in the circumstances, the preliminary issue in this case must be decided in favour of the defendant and therefore the defendant was not liable for the sum claimed as the late Sultan of Perak was not liable to any legal proceedings whatsoever in his personal capacity.

Cases referred to:

(1) *Mighell* v. *The Sultan of Johore* [1894] 1 Q.B. 149.

(2) *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46.

CIVIL SUIT.

S.N. Leow for the plaintiff.
Yeow Kwong for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: This case raises certain points of some constitutional importance in connection with legal proceedings herein against the estate of the late ruler of Perak; such proceedings were of course commenced after the demise of the said ruler whom I shall hereinafter refer to as the late sovereign.

After his demise, a grant of letters of administration to his estate was issued to the Official Administrator, Malaysia, as the administrator. The plaintiff, an oil company, claims a sum of $68,132.86 being price of diesel oil supplied to a mining firm of which the late sovereign was the sole proprietor, citing as the defendant, the Official Administrator, Malaysia, as administrator for the estate of the late sovereign.

The said administrator has entered an unconditional appearance to this suit and filed a defence, which, by its paragraph 5, states:

"5. Further and in the alternative, if which is denied the deceased was indebted to the plaintiff in the sum of $68,132.86 as alleged, the deceased's estate is not liable for the same as the deceased was at all material times the sovereign of the state of Perak and therefore not liable to any proceedings whatever in any court."

On a subsequent application from the plaintiff, the court, by consent of both parties, made an order that a preliminary issue as to whether the said paragraph 5 of the defence disclosed a good defence in law be tried first before the trial of other issues in the action. The application was well-advised.

At the hearing of the said preliminary issue, learned counsel for the administrator or defendant submitted to the effect as follows. The present action would never have been commenced had the late sovereign been alive. The debt was incurred by the late sovereign and this immunity (from legal process) that was available to the late sovereign continued after his demise. The said administrator would be clothed with the same immunity as the present action was in fact against the late sovereign.

He cited Article 181 of the Federal Constitution and Article XI of Part II of the Laws of the Constitution of Perak, and paragraph 896 of Vol. 8 of *Halsbury's Laws of England*, 4th Ed.

Learned counsel for the said administrator also submitted that the entry of an unconditional appearance would not amount to a submission to the jurisdiction of the court because the said administrator could not waive the immunity which attached to the late sovereign personally. Counsel cited the celebrated case of *Mighell* v. *The Sultan of Johore*.[1] It was submitted that when the court was asked to exercise jurisdiction, the late sovereign had already passed away.

On the other hand, learned counsel for the plaintiff submitted that there should have been a conditional appearance followed by an application to set aside (service of writ). He also cited sections 67 and 68 of the Probate and Administration Act 1959 referring to assets of a deceased person being available for payment of debts. It was

further submitted that, by applying for a grant of letters of administration, the administrator had already submitted to the jurisdiction of the court.

It would be obvious that the sovereignty, prerogatives, and powers of the late sovereign would fall for consideration.

To revert to the supreme law of the land, the Federal Constitution, the last article, *i.e.* Article 181, deals with and expressly preserves the sovereignty of rulers among whom was, of course, the late sovereign. It states:

"181.(1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the rulers and the prerogatives, powers and jurisdiction of the ruling chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatosever shall be brought in any court against the ruler of a state in his personal capacity."

Clause 2 of Article 181, on the question of immunity canvassed before the court, appears almost to be a complete code in itself in regard to the absolute immunity available to all rulers from all legal proceedings, both criminal and civil, except for one qualification, *i.e.* that such proceedings from which the rulers enjoy complete immunity must be proceedings brought against them in their personal capacity in contradistinction to proceedings against them in their official capacity. An example of liability to be sued in such official capacity would be the case of the dismissed Chief Minister against the Governor of Sabah State in *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli (No. 2).*[2] It was there argued for the defence that the power to proclaim a state of emergency vested in the Yang di-Pertuan Agong and by virtue of Article 32(a) of the Federal Constitution (conferring similar immunity on His Majesty), the proclamation could not be challenged. Pike C.J. held that the Article 32(a) (which is without the words "in his personal capacity") did not protect the federal government from acts done in the name of the Yang di-Pertuan Agong.

If I may venture to say so, Pike C.J. was undoubtedly right; were it otherwise, to carry further that aforesaid unsuccessful argument to its logical conclusion, the government of Malaysia could never be sued in court, *e.g.* for any breach of contract or tort committed by the federal government, for His Majesty is the supreme head and the constitutional monarch of the government of Malaysia. It is merely a matter of nomenclature that in legal proceedings, the name of Government of Malaysia is cited instead of the name or title of Yang di-Pertuan Agong. It is interesting to observe that in the United Kingdom's Court of Appeal (criminal division), I believe it is still *John Doe* v. *Regina* or John Doe against the Queen, a legacy from the past. Were it otherwise, more importantly, the Government Proceedings Act 1956 would be rendered useless.

To revert to more urgent matters in hand, I will now refer to the relevant provisions in the Laws of Constitution of Perak which should be clause (a) of Article XI and Article XII, but I will set out in full not only the two articles just mentioned, but also Article X of Part II of the Laws of the Constitution of Perak:

"X. In amplification and not in derogation of the royal prerogatives hitherto possessed or exercised by the sovereign the following royal prerogatives among others are vested in the sovereign:

(a) The Fountain of Honour,
(b) The Fountain of Justice,
(c) The Fountain of Mercy,
(d) The Head of the Religion of the State,
(e) The Protector of Malay Custom,
(f) The Ultimate Owner of the Soil.

XI. In the concept of sovereignty the following are inherent:

(a) The sovereign can do no wrong.
(b) The sovereign never dies.

XII. Sanctity shall attach to the person of the sovereign and such of his residences as shall be prescribed by the Dewan Negara."

I first deal with Article XII. It must have been derived from the principle in England that nobody ought to have any coercive power over the person of the king, so that the king is immune from all legal proceedings, either criminal or civil. In my judgment, the word "sanctity" in the said Article XII means inviolability since it is used in association with the words "to the person". The said Article XII has, in my judgment, the same effect as the aforesaid principle.

Yet another source of such immunity is to be found in clause (a) of the said Article XI which practically appears to be an enactment of the maxim that "the king can do no wrong" or its Latin version, *"rex non potest peccare"*, and thus

no remedy lies against the king in person, either of a civil or criminal nature: please see Vol. 8 of *Halsbury's Laws of England* mentioned above.

Thus both from the Federal Constitution and the Laws of the Constitution of Perak, no legal proceedings of whatever nature, criminal or civil, could have been maintainable against the late sovereign, and it goes without saying the same position undoubtedly still obtains today in Perak.

In my judgment, the extremely personal nature of the prerogative of immunity from all legal process to the person of the late sovereign cannot conceivably be ever transmitted to the administrator of his estate who can never aspire to have such sanctity to the person. Not having such prerogative or immunity, the administrator cannot waive it for he has nothing to waive. Consequently, the entry of an unconditional appearance, if it really has the effect of amounting to a submission to the jurisdiction of the court, would become completely immaterial and ineffective; neither would it have any of the effect learned counsel contended it had.

Before departing from this case, out of deference to counsel's arguments, though not necessary for the determination of the preliminary issue, I must say a few words about the question as to the effect, if any, of unconditional appearance coupled with a defence of the royal prerogative of immunity as pleaded in the defence filed, assuming that the late sovereign had been alive and had himself entered such appearance and entered such defence. I do not think that such circumstances would amount to a submission to jurisdiction of the court.

In so much as an entry of unconditional appearance gives rise to an inference of submission to jurisdiction as decided by the courts in the case of ordinary defendants resident out of jurisdiction, I do not think an analogy in regard to such an inference can, with any degree of finality, be drawn between a sovereign ruler and such ordinary defendants resident out of jurisdiction. Such an entry of appearance, coupled with the raising of the defence, could not really amount to a waiver of such immunity or to a consent to be sued. Our former Lord President, Tun Mohamed Suffian, in his book *An Introduction to the Constitution of Malaysia,* speaking about the right of a sovereign ruler to submit to jurisdiction, wrote about such submission being "either by himself suing or consenting to be sued".

Further, Kay L.J. in the case of *Mighell* v. *The Sultan of Johore*[1] appears to explain the onus of proving submission to jurisdiction as "... or unless being sued, he *actively elects* to waive his privilege ..."

Further, a defendant resident out of jurisdiction becomes subject to the jurisdiction *ipso facto* on his taking up residence within the jurisdiction, but the fact that the defendant in the *Mighell* case was not subject to such automatic imposition of similar liability would go some way in showing that the royal prerogative of such immunity is made of much sterner stuff than that look-alike immunity of ordinary defendants arising out of residence out of jurisdiction. Would not this be another reason that the aforesaid analogy should not be drawn in haste?

Kay L.J. in the same case also expressed the view that a sovereign ruler need not go to court and assert his right of immunity because the court would be bound to take notice of the fact it had no jurisdiction over the sovereign ruler. The inference of submission to jurisdiction from an entry of appearance (which is after all, in truth, a notification of one's intention to resist the claim) will be fairly negatived by the judicial notice of want of jurisdiction referred to.

In my view, an entry of unconditional appearance, even in the absence of a defence filed, pleading the defence of this prerogative of immunity would still not amount conclusively and *simpliciter* to a submission to jurisdiction, but it is only one of the factors to be considered, as to whether there is in fact such consent to be sued.

The court therefore decides the said preliminary issue in favour of the defendant by declaring that the defendant is not liable for the sum as claimed as the late ruler of Perak was not liable to any legal proceedings whatsoever in his personal capacity. Costs will be costs in the cause.

Order accordingly.

Solicitors: *S.N. Leow & Co.; Yeow & Co.*